Filed 12/27/04 South Coast Cab v. City of Anaheim CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SOUTH COAST CAB CO., INC.,	
Plaintiff and Appellant,	G031608 & G034127
v.	(Super. Ct. No. 800359)
CITY OF ANAHEIM, et al.,	O P I N I O N
Defendants and Respondents.	

Appeal from a judgment of the Superior Court of Orange County, David H. Brickner, Judge. Affirmed

Cazzell & Associates and Maryann Cazzell for Plaintiff and Appellant.

Jack L. White, City Attorney and Moses W. Johnson IV, Deputy City Attorney, for Defendant and Respondent City of Anaheim.

George R. Phillips for Defendant and Respondent Yellow Cab of North Orange County.

Jeffrey L. Farano for Defendant and Respondent Cabco, Yellow, Inc.

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I. *Sorting Out This Particular Appeal*

This is an appeal from the final judgment in this case, filed April 16, 2004. Though denominated an "amended" judgment, the judgment of April 16, 2004 is the first

document denominated "judgment" in this case to finally dispose of (or impliedly incorporate the previous disposal of) all claims brought against the City of Anaheim by South Coast Cab Company in Orange County Superior Court case number 800359.

There are two appellate case numbers in the appeal before us, G034127 and G031608.

Appellate case number G034127 is an appeal from the (finally final) judgment filed April 16, 2004. The notice of entry of that judgment was served on April 28, 2004, and the notice of appeal was filed Monday June 28, 2004 -- literally the last day possible because the 60th day fell on the Sunday the day before. (See Code Civ. Proc., § 12a ["If the last day for the performance of any act provided or required by law to be performed within a specified period of time is a holiday, then that period is hereby extended to and including the next day which is not a holiday."]; § 10 ["Holidays within the meaning of this code are every Sunday . . . ."].)

The other appellate case number, G031608, is a premature appeal from a purported judgment filed December 16, 2002. As we explained in *South Coast Cab Co. v. City of Anaheim* (G032823, March 15, 2004) [nonpub. opn.] [dismissing G032823 as premature because both parties were repeat offenders in ignoring one final judgment rule], appellate case number G031608 is premature because the "judgment" filed December 16, 2002 was interlocutory in nature. However, by order of May 10, 2004, this court has deemed the appeal in G031608 to be from the (truly) final judgment of April 16, 2004. Further, by order of August 3, 2004, this court has consolidated G034127 with G031608. Between the two cases, we thus (finally) have timely appeals which encompass the various decisions entered piecemeal by the trial court.

The two appeals embody three major sets of claims brought by South Coast Cab.

The first set of claims resolves around Anaheim's decision to change from a permit to a franchise system, which ultimately resulted in the reduction of taxi cab permits allotted to South Coast Cab from 117 to 30, and those 30 were only the result of being grandfathered into the new franchise system. (And the 30 permits run out in 2006).

These claims revolve around the "futility" issue, because the litigation at the trial level has centered on the fact that South Coast Cab never actually applied for a franchise, claiming that it would be "futile" to do so. In return, the city has argued that South Coast Cab's decision not to apply was a dispositive failure to exhaust administrative remedies. The franchise claim was disposed of by summary adjudication in November 2002, which became the subject of the premature appeal in G031608. The briefing in G031608 is thus focused almost entirely on the futility claim.

The second and third sets of claims are federal and state antitrust claims respectively. These were disposed of by way of partial judgments on the pleadings in March and April 2002. These antitrust claims *were* the subject of the appeal in G032823, which was dismissed as premature.

In order to give South Coast Cab a chance to substantively address its antitrust claims in the new (timely, and for once, proper) appeal in G034127, this court, by order filed August 3, 2004, invited the parties to submit supplemental briefing specifically addressed to South Coast Cab's antitrust claims.

Thus we now have substantively before us a timely consolidated appeal from a final judgment in which all three major sets of claims brought by South Coast Cab have been addressed on the merits. We will begin with the simpler claims first, the federal and state antitrust claims.

II. *The Antitrust Claims in G034127*

A. No Jurisdiction Over the Federal Claims

In G034127, we address a trilogy of antitrust claims which had been disposed of the previous March and April by way of judgments on the pleadings.

The federal antitrust claims are very easy. State courts have no subject matter jurisdiction over federal antitrust claims, period. (E.g., *Marrese v. American Academy of Orthopedic Surgeons* (1985) 470 U.S. 373, 385-386 ["state courts lack jurisdiction over federal antitrust claims"].) We have granted all of South Coast Cab's

requests that we take judicial notice of the firm's hitherto unsuccessful litigation in federal court where it has also been trying to press its federal antitrust claims, but as far as we're concerned that litigation merely shows South Coast Cab apparently recognized some time ago that the state courts had no jurisdiction over its federal antitrust claims.

Beyond that, we refuse to become embroiled in a topic that occupies a major share of the briefing in this appeal, namely whether South Coast Cab properly reserved its federal antitrust claims in federal court. That issue is for the federal courts to determine.

B. Law of the Case
Not to the Contrary

A few words about the law of the case doctrine are necessary, though. In the very first appellate opinion in this case, G026197, this court rejected two of Anaheim's attacks on South Coast Cab's state and federal antitrust causes of action as that rejection came to us from a ruling on demurrer. The first attack was that South Coast Cab's exclusive remedy was in administrative mandate. We rejected that attack, reasoning that the antitrust claims, predicated as they were on claims of unequal treatment *independent* of receiving any permit, were independent of the permit process and therefore also independent of any relief that might be obtained in administrative mandamus.

The city's second attack was that it had blanket immunity from any and all antitrust laws. Relying on language in *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 658 (which itself looked to then-viable federal antitrust law, *City of Lafayette v. Louisiana Power & Light Co.* (1978) 435 U.S. 389), we held that because South Coast Cab's claims were based on unequal treatment, its claim was not precluded as challenging the anti-competitive effects of some ordinance (which clearly would be precluded under *Fisher, supra*, 37 Cal.3d at pp. 658-659).

And that was *all* we held. We emphasized the narrowness of our ruling by ending our discussion of that section of the opinion with, "Beyond that, we need not comment further, or explore *whatever other defenses* Anaheim might have to South Coast

Cab's claims under substantive antitrust doctrine." (Emphasis added.) We certainly didn't decide the issue of whether, as a state court, we had any subject matter jurisdiction over South Coast Cab's federal antitrust claims. It should also be noted G026197 was decided *before* Anaheim adopted a franchise system. At that time, the city had an unconstitutionally vague permit system, a permit system which allowed officials to discriminate against competing taxi cab companies "at the point of enforcement."

Law of the case, as a doctrine, would preclude *Anaheim* from attacking our *earliest* decision as void because we lacked jurisdiction, even though our opinion didn't consider jurisdiction. (See *Ponce-Bran v. Trustees of Calif. State Univ. & Colleges* (1996) 48 Cal.App.4th 1656, 1660.) But the doctrine does not extend to the appeal before us *now*, given that we did not decide the issue of federal jurisdiction in the earlier appeal. (*Id*. at p. 1660, fn. 2 [no authority to extend law of case doctrine to confer jurisdiction in "subsequent appeal."].)

C. State Antitrust Laws Do Not
Extend to Political Subdivisions

As to the state Cartwright Act claim, *Blank v. Kirwan* (1985) 39 Cal.3d 311, 323 ["The actions of political subdivisions of the state, such as the City of Bell, and the effects of such actions are outside the scope of the act."] is dispositive on the merits.

South Coast Cab argues that a charter city is not a "political subdivision of the state," and therefore outside the scope of the rule. The attempted distinction is, however, untenable. The Legislature has declared in no less than four places that charter cities *are* political subdivisions of the state. (See Gov. Code, §§ 53060.1, subd. (a) ["It is the intent of the Legislature in enacting this section, to provide a uniform limit on the retirement benefits for the members of legislative bodies of all political subdivisions of the state, including charter cities and charter counties."]; 53208.5, subd. (a) ["It is the intent of the Legislature in enacting this section, to provide a uniform limit on the health and welfare benefits for the members of legislative bodies of all political subdivisions of the state, including charter cities and charter counties."]; 53217.5, subd. (a) ["It is the intent of the Legislature in enacting this section, to provide a uniform limit on the pension

trust benefits for the members of legislative bodies of all political subdivisions of the state, including charter cities and charter counties."]; Rev. & Tax Code, § 30462, subd. (b) ["It is the intent of the Legislature that Section 30111 continues to prohibit the imposition of local taxes by any city, charter city, town, county, charter county, city and county, charter cities and counties, or other political subdivisions of agency of this state . . . ."].)

Case law also recognizes that charter cities are political subdivisions of the state. (E.g., *Fenton v. City of Delano* (1984) 162 Cal.App.3d 400, 407 ["'The same exception applies to the political subdivisions of the state that are governed by general laws as distinguished from charters . . . .'"]; *Myers v. City Council of Pismo Beach* (1966) 241 Cal.App.2d 237, 243-244 [source of quote in *Fenton*].);

D. Law of Case

Not Applicable

It is true that the opinion in G026197 left the door open a crack on South Coast Cab's state antitrust claims, by rejecting, based on *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 658, a blanket immunity for Anaheim from antitrust laws. In retrospect our conclusion appears dubious on the merits, though dubiousness is certainly not a sufficient reason to depart from the law of the case doctrine. (See *Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 435 [doctrine cannot be ignored simply because court disagrees with a prior opinion in the case].)[1]

Be that as it may, we certainly did not opine, in G026197, on the question of whether, even if a city didn't have blanket immunity from state antitrust laws, a litigant could obtain *money damages* for violation of state antitrust law. *That* question, interestingly enough, was addressed in the next opinion, G030079, in which we noted -- albeit in the context of claims against two individual employees -- that state law implicitly precludes any such award.

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[1] Perhaps it might be appropriate to observe at this point that law of the case is a doctrine you only need when you're wrong.

South Coast Cab's substantive antitrust claims are entirely based on the way the old permit system worked, i.e., until the system was disbanded, newcomers were discriminated against because they had to show need, while entrenched taxi companies didn't. So the only relief that is conceivably available to South Coast Cab is money damages for the discrimination during that period, and that relief is precluded. (E.g., *People ex. rel. Freitas v. City and County of San Francisco* (1979) 92 Cal.App.3d 913, 925-926.) Since we did not address the issue of damages qua damages in G026197, our conclusion is not barred by the law of the case doctrine.

III. *The Franchise Claim in G031608*

That leaves the summary judgment of November 2002, disposing of South Coast Cab's various constitutional claims that the city could not deprive it of the permits it won in G026197 by changing over to a franchise system from a permit system. These claims were dealt with *extensively* in G030551, where we considered an appeal from the denial of a preliminary injunction, upholding the denial because the likelihood of South Coast Cab's prevailing on the merits was "so low" as to be actually "nil."

The likelihood was "nil," we said, because the record showed that South Coast Cab had every opportunity to apply for a franchise, the costs of applying for a franchise were not prohibitively expensive (a nonrefundable $3,000 fee), and the paperwork was not inherently difficult. South Coast Cab simply chose to pin its "entire hopes" on being exempt from the new franchise system.

This appeal (i.e., the briefing in G031608) is essentially more of the same on the franchise issue, with this one new twist: Having had the benefit of our opinion in G030551, South Coast Cab posits that its own *subjective* misreading of Anaheim's "request for proposal" (referred to too much in the briefing and record by the opaque acronym "RFP") excuses it from the need to exhaust its administrative remedies.

Insofar as South Coast Cab makes a new argument, it must be rejected. First, as a factual matter, as we showed in G030551, the city did nothing as regards the request for proposal to discourage submission of one. Indeed, as we showed there, the

true "cost" of submitting a proposal was a mere $3,000 plus the time it would take to make the proposal. We see no reason in this case to depart from the objective theory of language, on which most of the law itself is predicated. (E.g., *ACL Technologies v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773, 1793 [rejecting "linguistic nihilism" that holds that there is no objective meaning in language].)

Indeed, while South Coast Cab might reasonably have been *skeptical* that it wouldn't receive a fair shake if it submitted a proposal, it was not *reasonably* entitled to conclude that it would have been "futile" to do so. As we showed in G030551, it was not futile to do so. Objectively speaking, there was no basis for South Coast Cab to conclude that Anaheim would not treat it fairly.

Our Supreme Court's most recent consideration of the doctrine of exhausting on administrative remedies is to be found in *Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917. As regards the futility exception, the basic rules are well-established: It must be "clear" that exhaustion would be futile (*id*. at p. 936), and, more importantly, there is a requirement that the relevant agency "'has declared what its ruling will be on a particular case.'" (*Id*. at p. 936, quoting *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 418.) Merely having some basis to fear or suspect that one will not receive an unbiased reception to an application is not enough on this standard.

Here, the city had not, under the *Jonathan Neil* standard, "declared" what its ruling would be, but South Coast Cab assumed that it certainly would be negative. South Coast Cab was thus hostage to its own prognostications of ill-treatment, and pre-emptively decided -- with insufficient evidence as we showed in G030551 -- that the city was going to do it wrong even if it submitted a proposal.

The, at long last, final judgment filed April 16, 2004, is affirmed. The city shall recover its costs on appeal.

SILLS, P.J.

WE CONCUR:

RYLAARSDAM, J.

O'LEARY, J.